Supreme Court, U.S.
FILED
OCT 29 1993
OFFICE OF THE CLERK

No. 93-226

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

PARDEE & CURTIN LUMBER COMPANY AND
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for Certiorari to the
Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

The County Commission of Webster County takes exception to Pardee & Curtin Lumber Company's and the Sun Lumber Company's characterization of the question presented by their petition for certiorari, and therefore restates it as follows:

QUESTION: Whether assessment of coal property using a weighted average, during a transitional period until a state-wide program to ensure equality is set in place, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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STATEMENT OF THE CASE

The Supreme Court of the United States in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), held that the "welcome stranger" assessment methodology employed at that time by the Webster County Assessor violated the Equal Protection Clause where state law required all property to be taxed according to its estimated market value.[1]

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1. Article X, section 1 of the West Virginia Constitution provides, in part, that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as

Under the "welcome stranger" method of assessment, property is valued based on its purchase price, with the result being that similar parcels of property can be subjected to disproportionate tax burdens when one parcel bears a recent sales price and the purchase price for the other is very old.

In response to the decision in *Allegheny Pittsburgh*, West Virginia enacted a statute requiring the State Tax Commissioner to embark upon a statewide reappraisal of all property to facilitate the assessment of all property according to its true and actual value. See, W. Va. Code Section 11-1C-1, et seq. (reproduced in the appendix hereto). Until the statewide reappraisal is completed in 1993, the Webster County Assessor has temporarily employed a weighted average method to assess property taxes. Under the weighted average method, all property in the same class is valued at a certain amount per acre, representing the average of all values on which previous assessments of the class had been based, and assessed accordingly. Because an average value is used, rather than taking into consideration each property's individual characterisitics, some properties may be assessed at a greater proportion of their "true and actual value" than other properties though no proof was introduced below to show such disparities.

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directed by law." Section 11-3-1 of the West Virginia Code provides, in part, that "[a]ll property shall be assessed annually as of the first day of July at its true and actual value . . . ." The Supreme Court of the United States has recently held that a "welcome stranger" type of assessment methodology does not violate the Equal Protection Clause where state law does not require that assessments be made according to true and actual value. Nordlinger v. Hahn, 112 S. Ct. 2326 (1992).

Petitioners claim that the weighted average method of assessment violates the Equal Protection Clause because it fails to value property at its true and actual value, as required by state law. Petitioners appealed their assessments to the Webster County Commission, sitting as a Board of Equalization and Review. At the hearing before the County Commission, Petitioners submitted no evidence of the true and actual value of their properties; nor did Petitioners provide any evidence of the relative value of any other properties in the same class. The County Commission rejected Petitioners' arguments and upheld the assessments. Upon appeal of the County Commission's decision to the Circuit Court of Webster County, the Court affirmed the decision of the County Commission. Petitioners' Appendix 3a. Petitioners are appealing from the refusal of the West Virginia Supreme Court of Appeals to entertain Petitioners' appeal from the decision of the Circuit Court. See, Petitioners' Appendix 1a.

SUMMARY OF ARGUMENT

The assessment methodology employed by the Webster County Assessor is a temporary measure in place only until a statewide reappraisal is completed. The statewide reappraisal, scheduled for completion in 1993, is calculated to provide the Webster County Assessor with the true and actual values of the properties at issue in this case, as required by state law, and allow the Assessor to make assessments based on those values. As a short-term, interim method of assessment, the weighted average employed by the Webster County Assessor is valid and does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Cases relied upon by

Petitioners do not address the type of transitional scenario that exists in this case.

Furthermore, Petitioners have submitted no evidence of the true and actual value of their property, or the true and actual value of any other property in the same class, and have thus failed to establish a record that could show that they were victims of discrimination.

ARGUMENT

I.

THE WEIGHTED AVERAGE METHOD OF ASSESSMENT USED BY THE WEBSTER COUNTY ASSESSOR IS A TRANSITIONAL MECHANISM ONLY, AND IS THUS CONSISTENT WITH THE COURT'S DECISION IN *ALLEGHENY PITTSBURGH*

In affirming the Webster County Assessor's assessments of Petitioners, the Circuit Court stressed the temporary, transitional nature of the assessment method adopted by the Assessor. "The assessor in this instance has used a weighted average . . . . And the Court is of the opinion that that method of attempting to secure uniform and equal assessments is not constitutionally unsound under the circumstances. There may be some transitional inequality." Petitioners' Appendix 21a. "The assessor's position in making the assessments that are now and have been questioned was to attempt to obtain equality consistent with the Court's order previously entered by using a weighted average until the reevaluation being undertaken by the state tax commissioner's office could be fully implemented."

Petitioners' Appendix 21a. "This Court is of the opinion that there may be some transitional inequality here, but the Court is of the opinion that the assessor is not in a position to obtain substantial equality in one year." Petitioners' Appendix 22a. "[T]he assessor's position in attempting to carry out the court order was to use this as a transitional tool." Petitioners' Appendix 29a.

In the *Allegheny Pittsburgh* decision this Court recognized that transitional inequality in property tax appraisals does not violate the Equal Protection Clause.

> The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes, it does not require immediate general adjustment on the basis of the latest market development. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

Allegheny Pittsburgh Coal Co. v., County Commission of Webster County, West Virginia, 488 U.S. 336, 343 (1989) (citations omitted).

This Court clearly understands that a reappraisal intended to insure the fairness of property tax assessments cannot be accomplished overnight. The State Tax Commissioner of West Virginia is currently in the third and final year of a statewide reappraisal of all property in West Virginia, as recognized by the Circuit Court. Petitioners' Appendix 23a ("there is now in the process of being implemented a phase-in period to obtain equality, which is under the direction of the state tax commissioner"). During the transition period before such a reappraisal is completed, the assessor does not have the appraisal information necessary to assess taxes based on a property's true and actual value; yet property tax assessments must continue in order for local government to operate. In the context of this transition period before the statewide reappraisal is complete, the weighted average method of assessing property taxes employed by the Webster County Assessor is reasonable, as recognized by the Circuit Court.

In the case of *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U.S. 23 (1931), relied upon by Petitioners, this Court addressed the constitutionality of an assessment methodology similar to that used by the Webster County Assessor in this case, but did not address the validity of such a methodology in the context of a transitional assessment period. The Court in *Cumberland Coal* held that a tax assessment system that valued all coal property in a township at the same amount per acre, regardless of the property's true value, violated the Equal Protection Clause where it resulted in "intentional" and "systematic" undervaluation of property in the same class as that of Cumberland, whose property was taxed at full value.. *Id.* However, nothing in the *Cumberland Coal* opinion indicates that an assessment methodology based on a weighted average valuation is

invalid in the context of a transition period when information regarding the true value of property is not yet available to the assessor. Nor do any of the cases from other jurisdictions cited by Petitioners address a scenario involving a transition period.

Substantial case law suggests that a temporary divergence from appraising property according to market value, as a part of an overall plan to equalize assessments, does not violate the Equal Protection Clause. This Court in *Allegheny Pittsburgh* cited to *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350 (1918). In *Sunday Lake Iron Co.,* a town raised the assessment of a particular mine, pursuant to state statute, but ran out of time and did not complete reassessments on other similar properties. When the taxpayer argued that time constraints could not justify the discrimination, this Court found no "purpose or design to discriminate. [The town's] action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal." *Id.* at 353. The *Sunday Lake Iron Co.* opinion has been relied upon often, and recently, to validate cyclical reappraisal systems. See, *Nash v. Assessor of Town of Southhampton,* 571 N.Y.S.2d 951 (A.D. 2d Dept. 1991); *Alexander v. Town of Barton,* 565 A.2d 1294 (Vt. 1989); see also, "Real-estate tax equalization, reassessment, or reevaluation program commenced but not completed within the year, as violative of constitutional provisions requiring equal and uniform taxation" 76 A.L.R.2d 1077.

In *Nash, supra,* the New York Supreme Court, Appellate Division considered a situation where property was reassessed when it was sold, subdivided, improved by new construction, or became subject to reassessment under a land equalization program. The Court in that case found a delay in reassessment of some property, but

denied summary judgment because questions remained regarding the nature and extent of purported inequities, how long such inequities would persist, and whether the disparate tax treatment arose out of intentional, invidious, or arbitrary discrimination. *Nash, supra* at 955.

In *Alexander, supra*, , the Supreme Court of Vermont validated a town's "rolling reappraisal" system, and specifically distinguished *Allegheny Pittsburgh* on the grounds that "it dealt with a system that acted to perpetuate discrimination rather than eliminating it. [Also] the disparities were far greater in magnitude than those present here and were essentially permanent." *Alexander, supra* at 1301 (emphasis added). Thus, recent cases dealing with the validity of local property tax systems have recognized that temporary inequality of taxation does not violate the Equal Protection Clause.

II.

PETITIONERS FAILED TO ESTABLISH A RECORD THAT COULD SUPPORT A CLAIM OF DISCRIMINATION

Unlike the taxpayers in *Allegheny Pittsburgh*, Petitioners do not claim that similarly situated property is taxed differently. Rather, Petitioners claim that the Equal Protection Clause is violated when differently situated property is taxed similarly. See, Petitioners' Petition for Writ of Certiorari, pages 9-12. Though their statement of the law may be an accurate (albeit contextually incomplete) reflection of this Court's opinion in *Cumberland Coal, supra*, Petitioners in the tribunals below failed to submit any evidence concerning the true and actual value of their properties, or any other properties, whether situated similarly or differently.

Thus, the record in this case, as summarized in the Petition, does not adequately support Petitioners' contention that properties of different values are taxed similarly. More importantly, however, even if the record supports an inference of inequality, no Petitioner made any effort to show that its properties, considered together, were undervalued relative to other taxpayers.

The circuit court remarked upon the lack of any evidence in the record regarding the true and actual values of Petitioners' properties, or the true and actual values of any other properties. See, Petitioners' Appendix 23a-24a ("There was a lack of evidence to show what the protested property, that there is a lack of evidence on part of the protesting taxpayers to show what the property in question was actually worth . . . . There wasn't evidence offered on behalf of the protesting taxpayers to show what the value of coal was. There was not evidence offered to show what the value of unmanaged timberland per acre was, that I recall. There was not evidence offered to show the value of unimproved land. The basic argument was that the assessment was wrong.") As recognized by the circuit court, Petitioners have failed to make any showing that they were injured by the alleged discrimination, and have thus failed to establish a record suitable for review by this Court.

CONCLUSION

For the reasons stated, Respondent prays that the Writ of Certiorari be denied

Respectfully submitted,
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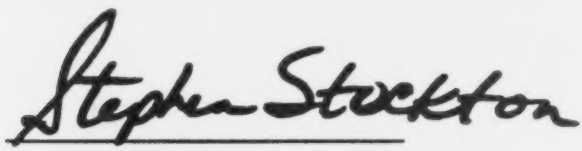

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October 28, 1993

APPENDIX

West Virginia Code Section 11-1C-1.
Legislative findings.

(a) The Legislature hereby finds and declares that all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.

(b) The Legislature by this article seeks to create a method to establish and maintain fair and equitable values for all property. The Legislature does not intend by this article to implement the reappraisal as conducted under articles one-a and one-b [sections 11-1A-1 et seq.and 11-1B-1 et seq.] of this chapter nor does it intend to affect tax revenue in any manner.

(c) The Legislature finds that requiring the valuation of property to occur in three-year cycles with an annual adjustment of assessments as to those properties for which a change in value is discovered shall not violate the equal and uniform provision of section one, article ten of the West Virginia Constitution, the Legislature further finding that such three year cycle and annual adjustment are an integral and indispensable part of a systematic review of all properties in order to achieve equality of assessed valuation within and among the counties of this state. Notwithstanding such finding, the Legislature intends to permit the assessors and the board of public works to place proportionately uniform percentage changes in values on the books during the the two tax years preceding the tax year beginning on the first day of July, one thousand nine hundred ninety-three,

in accordance with the provisions of section seven [section 11-1C-7] of this article.

(d) The Legislature deems that the goal of this article is that by the end of the three-year cycle contemplated by this article, and thereafter from year to year, all property shall be annually assessed at sixty percent of its then current fair market value except for the values derived for farms and managed timberland properties, which are to be valued as prescribed by this article, one-c and article four [sections 11-1C-1 et seq. and 11-4-1 et seq.] of this chapter. (1990, c. 172; 1990, 3rd Ex. Sess., c.5)

West Virginia Code Section 11-1C-3(a)

(a) There is hereby created, under the department of tax and revenue, a property valuation training and procedures commission which consists of the state tax commissioner, or a designee, who shall serve as chairperson of the commission, three county assessors, five citizens of the state, one of which shall be a certified appraiser, and two county commissioners. The assessors, five citizen members and two county commissioners shall be appointed by the governor with the advice and consent of the Senate. For each assessor to be appointed, the West Virginia assessors association shall nominate three assessors, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. For each of the two county commissioners to be appointed, the county commissioner's association of West Virginia shall nominate three commissioners, no more than two of whom shall belong to the same political party, and shall submit such list of nominees to the governor. Except for the tax commissioner, there may not be more than one member from any one county. No more than seven

members of the commission shall belong to the same political party: Provided, That any member of the commission who is a direct party to any dispute before the board shall excuse himself or herself from any consideration or vote regarding the dispute. By the first day of November, one thousand nine hundred ninety, the governor shall appoint the fifth citizen member, who shall serve a two-year term.

West Virginia Code Section 11-1C-4(a)(2)

(a) On or before the first day of October, one thousand nine hundred ninety, and thereafter as necessary the property valuation training and procedures commission shall perform the following duties:

(2) Establish uniform, statewide procedures and methodologies for the mapping, visitation, identification and collection of information on the different species of property, which procedures and methodologies shall include reasonable requirements for visitation of property, including a requirement that a good faith effort be made to contact any owner of owner-occupied residential property: Provided, That the commission is not authorized to establish the methods to value real and personal property, but shall have the authority to approve such methods.

West Virginia Code Section 11-1C-7

Duties of county assessors; property to be appraised at fair market value; exceptions; initial equalization; valuation plan.

(a) Except for property appraised by the state tax commissioner under section ten [section 11-1C-10] of this article and property appraised and assessed under article six [section 11-6-1 et seq.] of this chapter, all assessors shall, within three years of the approval of the county valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the property valuation training and procedures commission and the valuation system established by the tax commissioner.

(b) In determining the fair market value of the property in their jurisdictions, assessors may use as an aid to valuation any information available on the character and values of such property including, but not limited to, the updated information found on any statewide electronic data processing system network established pursuant to section twenty-one [section 11-1A-21], article one-a of this chapter. Valuations shall not be based exclusively on such statewide electronic data processing system network, and usage of the information on such files as an aid to proper valuation shall not constitute an implementation of the statewide mass reappraisal of property.

(c) Before beginning the valuation process, each assessor shall develop a county valuation plan for using information currently available, for checking its accuracy

and for correcting any errors found. The plan must be submitted to the tax commissioner on or before the first day of December, one thousand nine hundred ninety, for review and approval, and such plan must be revised as necessary and resubmitted every three years thereafter. Whenever a plan is submitted to the tax commissioner, a copy shall also be submitted to the county commission of that county and the property valuation training and procedures commission, and that county commission and the property valuation training and procedures commission may forward comments to the tax commissioner. The tax commissioner shall respond to any plan submitted or resubmitted within sixty days of its receipt. The valuation process shall not begin nor shall funds provided in section eight [section 11-1C-8] of this article be available until the plan has received approval by the tax commissioner: Provided, That any initial plan that has not received approval by the commissioner prior to the first day of May, one thousand nine hundred ninety-one, shall be submitted on or by such date to the valuation commission for resolution prior to the first day of July, one thousand nine hundred ninety-one, by which date all counties shall have an approved valuation plan in effect.

(d) Upon approval of the valuation plan, the assessor shall immediately begin implementation of the valuation process. Any change in value discovered subsequent to the certification of values by the assessor to the county commission, acting as the board of equalization and review, in any given year shall be placed upon the property books for the next certification of values: Provided, That notwithstanding any other provision of this code to the contrary, the property valuation training and procedures commission may authorize the tax commissioners to approve a valuation plan and the board of public works to submit such a plan which would permit

the placement of proportionately uniform percentage changes in values on the books that estimate the percentage difference between the current assessed value and sixty percent of the fair market value for classes or identified sub-classes of property and distribute the change between the two tax years preceding the tax year beginning on the first day of July, one thousand nine hundred ninety-three. This procedure may be used in lieu of placing individual values on the books at sixty percent of value as discovered, or may be in addition to such valuation. If such procedure is adopted by a county, then property whose reevaluation is the responsibility of the board of public works and the state tax commissioner shall have its values estimated and placed on the books in like manner. Such estimates shall be based on the best information obtained by the assessor, the board of public works and the tax commissioner, and the changes shall move those values substantially towards sixty percent of fair market value, such sixty percent to be reached on or before the first day of July, one thousand nine hundred ninety-three.

West Virginia Code Section 11-1C-9.
Periodic Valuations

(a) After completion of the initial valuation required under section seven [section 11-1C-7] of this article, each assessor shall maintain current values on the real and personal property within the county. In repeating three-year cycles, every parcel of real property shall be visited by a member of the assessor's staff who has been trained pursuant to section six [section 11-1C-6] of this article to determine if any changes have occurred which would affect the valuation for the property. With this information and information such as sales ratio studies provided by the tax commissioner, the assessor shall

make such adjustments as are necessary to maintain accurate, current valuations of all the real and personal property in the county and shall adjust the assessments accordingly.

(b) In any year [that] the assessed value of a property or species of property be less than or exceed sixty percent of current market value, the tax commissioner shall direct the assessor to make the necessary adjustments. If any assessor fails to comply with the provisions of this section, the tax commissioner may, at the county commission's expense, take reasonable steps to remedy the assessment deficiencies (1990, c. 172.)

West Virginia Code Section 11-C-10(a)(2)

(a) As used in this section:

(2) "Natural resources property" means coal, oil, natural gas, limestone, fireclay, dolomite, sandstone, shale, sand and gravel, salt, lead, zinc, manganese, iron ore, radioactive mineral, oil shale, managed timberland as defined in section two [section 11-1C-2] of this article, and other minerals.

West Virginia Code Section 11-C-10(d)

(d) Within three years of the approval date of the plan required for natural resources property required pursuant to subsection (e) of this section, the state tax commissioner shall determine the fair market value as defined in section one [section 11-3-1], article three of this chapter of all natural resources property in the state. The commissioner shall thereafter maintain accurate values for all such property.

West Virginia Code Section 11-1C-10(b)

All owners of industrial property and natural resources property each year shall make a return to the state tax commissioner and, if requested in writing by the assessor of the county where situated, to such county assessor at a time and in the form specified by the commissioner of all industrial or natural resources property owned by them. The commissioner may require any information to be filed which would be useful in valuing the property covered in the return. Any penalties provided for in this chapter or elsewhere in this code relating to failure to list any property or to file any return or report may be applied to any owner of property required to make a return pursuant to this section.

West Virginia Code Section 11-1C-12.
Board of equalization and review; assessments; board of public works.

(a) As valuations of property in a county are completed to the extent that a total valuation of property can be determined, such valuation shall be delivered by the assessor to the county commission, and the county commission, sitting as a board of equalization and review, shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property.

(b) For the tax year subsequent to the end of the initial valuation period in each county, and for each year thereafter, each county shall implement a uniform assessment that is equal to sixty percent of the most current appraised value for all real and personal property

situated within the county. Such implementation shall be in accordance with provisions to be included in the plan required by section seven [section 11-1C-7] of this article.

(c) Until such time as the uniform sixty percent assessment required in subsection (b) is effected, the total assessed valuation in each of the four classes of property shall not be less than sixty percent nor more than one hundred percent of the appraised valuation of each said class of property.